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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 77-693

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT AMERICAN MUTUAL REINSURANCE COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT OF FACTS.

Petitioner's Statement of the Case, which American Mutual Reinsurance Company ("Amreco") adopts, is based upon the opinion of the Court of Appeals.

Because of the nature of the proceeding in the Court of Appeals, the record before that court consisted only of the motion to file a Petition for Writ of Mandamus directed to Judge Will and the Briefs in Support of and in Opposition to the motion.

However, for this Court to fully appreciate the ramifications of the Court of Appeals decision the history of the parallel state court action must be considered.

This litigation was commenced in July of 1974 when Amreco filed a straightforward contract action against Calvert Fire Insurance Company ("Calvert") in the Circuit Court of Cook County, Illinois. Amreco in its Complaint alleged that Calvert breached its reinsurance contract with Amreco. Amreco had a similar contract with 99 other reinsurers. The reinsurance contract, in question, covered the year 1974, a year in which casualty and fire losses were unusually high.

Calvert was the only one of the 100 reinsurers who were parties to similar contracts that attempted to avoid its liability under the reinsurance contract. Calvert has alleged that Amreco made misrepresentations in order to induce Calvert to enter the contract.

Amreco is prepared to prove that Calvert attempted to rescind its agreement only after Calvert became aware of potential losses under the reinsurance agreement resulting from a disastrous wave of tornados which struck the South and Midwest in early April, 1974.[1]

The basic dispute is simple. The only issue is whether Calvert was induced by fraud to enter the agreement or whether Calvert is attempting to avoid liability under the agreement because the reinsurance industry incurred heavy losses in early 1974. This is the real issue, but Calvert has not sought to have that issue resolved by any court. Rather, Calvert has mounted a two pronged diversionary attack. First, Calvert attempted to disguise the real issue by raising a "security" issue smoke screen. Second, Calvert has ingeniously pursued virtually every avenue of motion practice and appeal to avert a determination of the real issue for 3½ years.

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1. "Twisters Put Reinsurers in the Forefront", The National Underwriter, April 12, 1974, at 1, col. 4 ("The reinsurers are going to get murdered"). The telegram from G. E. Roberts, President of Calvert, demanding Amreco to "Terminate our multi-line reinsurance agreement retroactive to January 1, 1974" was sent on April 19, 1974.

Amreco has sought a prompt adjudication of the issue but has been subjected to a continuing barrage of dilatory and burdensome procedures. To avoid an adjudication of the basic issues, Calvert has:

1. Moved to have Amreco's action dismissed on the ground that declaratory action was not an appropriate remedy for breach of contract.
2. Moved to stay discovery in the state court action pending its motion to dismiss.
3. Attempted, a second time, to have Amreco's action dismissed or, in the alternative, transferred from the Law Division to the Equity Division to determine whether the matter should be heard as a class action.
4. Answered Amreco's Complaint alleging as both affirmative defenses and counterclaims violations of federal and state securities laws. Calvert also alleged common law fraud as a defense to Amreco's action and as a counterclaim. Calvert also pleaded a violation of Rule 10b-5 as a defense to Amreco's complaint.
5. Instituted the instant action in the United States District Court. The only addition to the allegations made by Calvert in the Illinois court, was the addition of Rule 10b-5 as authority for its ancillary claim for money damages in the amount of $2 million.
6. Moved to stay the state court proceedings pending the outcome of its federal court action. This motion was summarily denied.
7. Having failed to have the state court actions stayed, sought a change of venue on the grounds that the trial court was prejudiced against Calvert. Calvert's motion, again, was summarily denied.
8. Filed a petition for writ of mandamus in the Supreme Court of Illinois, after the state trial court had issued its decision on Calvert's defenses and counterclaims, seeking an order that the trial court judge grant Calvert's motion for a change of venue. This motion was summarily denied by the Illinois Supreme Court.

9. Sought an interlocutory appeal to the Appellate Court of Illinois, when the trial court rejected Calvert's alleged defenses and counterclaims based on federal and state securities laws. The appeal was granted, and the Illinois Appellate Court affirmed the decision of the state trial court.

10. Sought leave to appeal to the Illinois Supreme Court from the judgment of the Illinois Appellate Court. Amreco has filed a Brief in Opposition to Calvert's petition. If Calvert's petition for Leave to Appeal is denied, the judgment of the Appellate Court of Illinois and the Circuit Court of Cook County will become final under Illinois law.

Calvert's ingenuity at motion practice and appeal is demonstrated by the fact that at this date it has succeeded in bringing one aspect or another of this matter before the Circuit Court of Cook County, Illinois, the Appellate Court for the First District of Illinois, the Illinois Supreme Court, the United States District Court for the Northern District of Illinois, and the United States Court of Appeal for the Seventh Circuit. Amreco has been required to respond to each of Calvert's efforts. Presentation of Judge Will's petition to this Court, involves the sixth court to consider some aspect of this matter.

Calvert has been so successful in avoiding the simple issue involved in this case, that its defense, if any, has been obscured. Calvert has attempted to cast this simple transaction into a "security" issue solely to divert attention from the real merits of the matter.

Judge Will, perceived this very early and proceeded to issue his stay order to confine Calvert's legal gymnastics to the state courts. Unfortunately, the Seventh Circuit Court of Appeals in issuing its writ of mandamus to Judge Will, has permitted Calvert to continue its dilatory practices in the federal courts.

If Calvert's past actions can be used as any measure of its future activities, it is clear Calvert will attempt to pursue its state court matter to this Court by writ of certiorari. At the same time with the federal court doors now opened to Calvert, Calvert will have the opportunity to have Judge Will determine that its reinsurance contract is not a "security". The next step will be for Calvert to seek review of Judge Will's decision in the Seventh Circuit Court of Appeals and, if not satisfied there, seek certiorari in this Court.

ARGUMENT.

I.

GRANTING THE WRIT OF CERTIORARI AND SUMMARY REVERSAL OF THE DECISION BELOW WILL PREVENT ABUSIVE PROCEDURAL TACTICS FROM BECOMING LITIGATING STRATEGIES IN THE SEVENTH CIRCUIT. IT WILL RESTORE TO DISTRICT JUDGES, IN APPROPRIATE CASES, THE DISCRETION TO PROTECT LITIGANTS FROM BURDENSOME DUPLICATIVE LITIGATION.

As demonstrated above, Calvert has had its "security" issue determined by the Illinois trial court, the Illinois Appellate Court and is now seeking review of the issue in the Illinois Supreme Court.

Notwithstanding the impending final resolution of the issue in the state court, the Court of Appeals for the Seventh Circuit has granted Calvert the right to an "immediate" adjudication of the same issue by Judge Will in the United States District Court. Calvert will pursue that right despite the indication made by Judge Will that he would rule that the reinsurance contract in question was not a security.[2]

Absent all questions of *res judicata* and collateral estoppel resulting from the state court determination, there is no valid

2. Transcript of Proceedings before the Hon. Hubert L. Will on June 18, 1975, at 3, *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company*, Docket No. 75 C 103 (N. D. Ill. 1975).

reason why Calvert, which has placed the federal securities issue before both the state courts and the United States District Court, should be the beneficiary of a writ of mandamus directing Judge Will to immediately adjudicate its "security" issue. The result of such a ruling can only be another appeal by Calvert to the United States Court of Appeals, after Judge Will rules. The only purpose of such an appeal would be the hope of Calvert that the Court of Appeals for the Seventh Circuit would rule contrary to the Circuit Court of Cook County, the Illinois Appellate Court and Judge Will, enabling Calvert to present inconsistent adjudications of the same case to this Court for resolution.

The failure of this Court to grant the writ of certiorari and reverse the Court of Appeals decision will permit Calvert to continue shopping for a court which will favorably rule on its "security" issue, notwithstanding the fact several courts have already considered the question. Unquestionably, the Court of Appeals decision effectively condones Calvert's decision shopping, and undoubtedly will encourage other litigants to follow Calvert's example. Summary reversal of the Court of Appeals decision, as suggested by the Petitioner, will prevent this abusive practice from becoming an established litigating procedure in the Seventh Circuit.

The Court of Appeals decision is all the more grievous because it is predicated upon the assumption that Calvert had a claim under the Securities Exchange Act of 1934 against Amreco. Nothing could be further from reality.

Calvert's claim for money damages is merely the reverse side of Calvert's claim for rescission of the contract. Calvert has paid nothing to Amreco under its contract. Money damages would accrue to Calvert only if it were held liable under the contract. If granted rescission, no damages would ensue. Calvert's claim for rescission under the federal securities acts has been raised by Calvert in the Illinois case. The money damage claim is totally superfluous to Calvert's claims and defenses as was recognized by

Judge Will during oral argument[3] and apparently was included by Calvert in part to maximize the possibility of securing dual adjudications in the state and federal courts.

That this Court intended its decision in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976) to bring the foregoing results is simply untenable. That the Court of Appeals for the Seventh Circuit did not appreciate the practical consequences and ramifications of its issuance of the Writ of Mandamus is patently clear.

The history of this litigation clearly exemplifies the unintended ramifications of the Seventh Circuit's application of this Court's decision in *Colorado River*. To avoid such abusive practices in the future, district court judges must be revested with the authority they formerly possessed to control their dockets. This Court may rectify this situation quickly, by summarily reversing the decision below with a brief reaffirmance of *Landis* v. *North American Co.*, 299 U. S. 248 (1936) as suggested by the Petitioner.

II.

THE GRANTING OF THE WRIT OF CERTIORARI WILL REMEDY THE PLAINLY ERRONEOUS INTERPRETATION OF THE COURT OF APPEALS OF THIS COURT'S HOLDING IN THE COLORADO RIVER CASE.

The Court of Appeals for the Seventh Circuit totally misapprehended the holding of this Court in the *Colorado River* case in determining to issue the writ of mandamus to the Honorable Hubert L. Will. *Colorado River*, indeed, may be read as supporting a dismissal of this case. In the *Colorado River* case, this Court approved the propriety of dismissing an action commenced in the United States District Court when the same issue was pending in the state court. The Court of Appeals for the Seventh

3. Transcript of Proceedings before the Hon. Hubert L. Will on May 9, 1975, at 50, *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company*, Docket No. 75 C 103 (N. D. Ill. 1975).

Circuit read *Colorado River* as permitting a court to stay procedures only in "exceptional circumstances", not finding such circumstances in this case.

The *Colorado River* case does not support, much less demand, the decision below. In *Colorado River,* the cause of action was dismissed and the aggrieved party in *Colorado River* was deprived of any remedy in federal court. This Court was understandably cautious in sanctioning a final dismissal.

The instant case does not involve a dismissal but merely a stay order. Calvert has not been deprived of any federal remedy. The adjudication of Calvert's federal remedy has merely been postponed by Judge Will's order granting the stay of proceedings and his unwillingness to proceed with the ancillary Rule 10b-5 claim while the substantive issues of the federal securities laws were litigated by Calvert in the courts of Illinois.

Colorado River does not support the Court of Appeals issuance of a writ of mandamus. *Colorado River* teaches, to the contrary, that federal judges have discretion, which was utilized by Judge Will, when necessary to avoid piecemeal litigation. Even when speaking of dismissal of the action rather than mere postponement, *Colorado River* teaches:

> "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, cf. *Gulf Oil Corp.* v. *Gilbert* 330 U.S. 501, 91 L.Ed. 1055, 67 S.Ct. 839 (1947), the desirability of avoiding piecemeal litigation, cf. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 495, 86 L.Ed. 1620, 62 S.Ct. 1173 (1942), and the order in which jurisdiction was obtained by the concurrent forums, *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U.S. 440, 447, 60 L.Ed. 1084, 36 S.Ct. 637 (1916). No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise." 424 U. S. at 818-19.

These are exactly the elements Judge Will considered in deciding to postpone ruling on certain aspects of the federal claim.

Arguably, if he had the discretion under *Colorado River* to dismiss on those grounds, certainly he may exercise the lesser power to postpone. Any other reading of *Colorado River* completely undermines the intent of this Court.

Any contrary reading of *Colorado River* would lead to the conclusion that a District Court must grant an "immediate" adjudication to a person claiming a federal right even while that same party has had two adjudications of the issue in the state courts and is still vigorously pursuing its remedies based upon the federal statutes in the state courts.

The granting of the writ of certiorari in the instant case and summary reversal of the decision below would cure the confusion resulting from the opinion of the Court of Appeals for the Seventh Circuit.

CONCLUSION.

It is therefore respectfully submitted that the writ of certiorari should be granted and the writ of mandamus vacated.

Amreco concurs, with the Petitioner, that summary reversal is the most expedient disposition of this matter, and, therefore, respectfully suggests summary reversal of the decision below.

Respectfully submitted,

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